Chew Ling Hang v Aw Ngiong Hwa

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-723 OF 1995
SITI NORMA YAAKOB, MAHADEV SHANKAR AND DENIS ONG JJCA
24 JUNE 1997

Family Law *— Divorce — Ancillary matters — Application for ancillary reliefs after decree nisi was made absolute — Whether application could be made at an indefinite time after decree was made absolute — Whether leave of court required — Law Reform (Marriage and Divorce) Act 1976 s 76 — Divorce and Matrimonial Proceedings Rules 1980 r 56*

The respondent ('the husband') filed his divorce petition on 22 June 1987. The appellant ('the ex-wife') who was duly served, did not file an answer to the petition which contained prayers for orders by way of an ancillary relief. More than three years after the decree absolute, the ex-wife filed an application on 19 July 1991 for ancillary relief claiming a half share in a house and a car purchased by the husband. The judge held that such an application could not be made without leave and refused it. The ex-wife appealed.

The ex-wife submitted that since she had not filed any answer at all, she did not require any leave from the court to apply for ancillary relief, and that the passage of any length of time after the decree of dissolution was irrelevant, citing English authorities to support her submission.

The issues before the court were whether: (i) a spouse who had not applied for ancillary relief before a divorce decree was made absolute could make such an application at an indefinite time thereafter; and (ii) she could do it without obtaining the leave of the court.

Held, dismissing the appeal:

The Law Reform (Marriage and Divorce) Act 1976 ('the Act') and the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules') were advisedly so worded so that the decree absolute should, as far as is humanly possible, leave each spouse free to make a new life for himself or herself without being unjustly harassed by fresh claims from a disgruntled ex-spouse which should properly have been ventilated at the time the decree was being made.

The relevant section in the Act is very differently worded from the English legislation. The word 'when' in s 76(1) and (3) of the Act means at the time the decree is being granted. The residuary powers of the court to extend or to abridge time is always there, but the words are clear and any order for ancillary relief must relate back to the granting of the decree because it is upon the decree that the

ancillary relief is hinged. Since s 76 requires the matter to be dealt with when granting the decree, the Form 11 notice must be filed before the decree is made.

Rule 56 of the Rules makes the position clearer. The ex-wife's claim for property division had to be made in her answer. The interpretation of r 56(2)(a) is that if the claim for ancillary relief is not made in the petition or answer, it can be made subsequently at the trial, in which case no notice in Form 11 is required, or it can be made by leave of the court by notice in Form 11. The interpretation of the word 'subsequently' in r 56(2) means after the answer was or should have been filed but before the grant of the decree absolute.

Since this case concerned an application for the division of assets acquired during marriage, it came within the four walls of s 76(1) and (3) of the Act. By failing to make her application before the decree nisi or at least before it was made absolute, the ex-wife was too late (see pp 112E–I and 113A–G).

[Bahasa Malaysia summary

Penentang ('si suami') telah memfailkan petisyen penceraian pada 22 Jun 1987. Pemohon ('bekas isteri') yang telah diserahkan dengan petisyen tersebut dengan wajarnya telah tidak memfailkan jawapan kepada petisyen yang mengandungi permohonan untuk perintah melalui relif sampingan. Lebih dari tiga tahun dari deckri mutlak, bekas isteri tersebut telah memfailkan suatu permohonan pada 19 Julai 1991 untuk relief sampingan dengan menuntut separuh bahagian dalam rumah dan kereta yang dibeli oleh suami. Hakim telah memutuskan bahawa permohonan begitu tidak dapat dibuat tanpa kebenaran dan telah menolaknya. Bekas isteri telah merayu.

Bekas isteri telah menghujahkan bahawa oleh kerana dia langsung telah tidak memfailkan sebarang jawapan, maka dia tidak memerlukan kebenaran mahkamah untuk memohon untuk relif sampingan. dan tempoh masa yang berlalu setelah dekri mutlak tersebut adalah tidak relevan, mengemukakan nas-nas undang-undang Inggeris untuk menyokong hujahannya.

Isu di hadapan mahkamah adalah sama ada: (i) suatu pihak pasangan suami-isteri yang telah tidak memohon untk relief sampingan sebelum dekri penceraian telah dibuat mutlak boleh membuat suatu permohonan untuk suatu yang tidak ditentukan setelah itu; dan (ii) dia boleh berbuat begitu tanpa kebenaran mahkamah.

Diputuskan, menolak rayuan:

Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') dan Kaedah-Kaedah Prosiding Perceraian dan Perkahwinan 1980 ('Kaedah-Kaedah tersebut') telah digubalkan begitu supaya, seboleh yang mungkin, setiap pasangan suami isteri adalah bebas memulakan kehidupan yang baru tanpa diganggu dengan tidak wajarnya oleh tuntutan-tuntutan baru dari bekas pasangan

yang tidak berpuas hati, yang sepatutnya telah dibuat semasa dekri tersebut dibuat.

Seksyen yang relevan dalam Akta tersebut digubal dengan cara yang berlainan dari perundang Inggeris. Perkataan 'apabila' dalam s 76(1)dan (3) Akta tersebut bermakna pada masa dekri tersebut diberikan. Kuasa bakian mahkamah untuk melanjutkan ataupun memendekkan masa sentiasa ada, tetapi perkataannya adalah jelas dan sebarang perintah untuk relif sampingan patut dikatikan dengan memperian dekri kerana relif sampingan tersebut adalah berdasarkan dekri. Oleh kerana s 76 memerlukan perkara tersebut dikendalikan semasa pemberian dekri, maka notis Borang 11 harus difailkan sebelum dekri diberikan.

Kaedah 56 Kaedah-Kaedah tersebut menjelaskan keadaannya. Tuntutan bekas isteri untuk pembahagian harta terpaksa dibuat dalam jawapannya. Tafsiran k 56(2) adalah bahawa jikalau tuntutan untuk relif sampingan tidak dibuat dalam petisyen ataupun jawapannya, iannya boleh dibuat kemudiannya semasa perbicaraan, di mana notis Borang 11 tidak diperlukan. Tafsiran perkataan 'kemudiannya' dalam k 56(2) bermakna setelah jawapan sudah ataupun patut difailkan tetapi sebelum pemberian dekri mutlak.

Oleh kerana kes ini adalah berkenaan dengan permohonan untk pembahagian aset yang diperolehi semasa perkahwinan, ianya dirangkumi oleh s 76(1) dan (3) Akta tersebut. Oleh kerana bekas isteri telah gagal membuat permohonan sebelum dekri nisi kalaupun tidak sebelum ia dibuat mutlak, maka ianya telah lambat (lihat ms 112E–I dan 113A–G).]

Notes

For cases on ancillary matters, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1871–1875.

Cases referred to

Chaterjee v Chaterjee [1976] 1 All ER 719 (refd)
Leow Kooi Wah v Ng Kok Seng Philip & Anor [1995] 1 MLJ 852 (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 r 56
Law Reform (Marriage and Divorce) Act 1976 s 76
Family Proceedings Rules 1991 r 2.53 [UK]
Matrimonial Causes Act 1950 ss 19, 20 [UK]
Matrimonial Causes (Property and Maintenance) Act 1958 [UK]
Matrimonial Causes Rules 1973 r 68 [UK]

Appeal from: Divorce Petition No 85–47–364 of 1987 (High Court, Kuala Lumpur)

Balwant Singh Sidhu (*Balwant Singh Sidhu & Co*) for the appellant. A
Azhar Azizan Harun (*Azhar & Goh*) for the respondent.

Mahadev Shankar JCA (delivering the judgment of the court): Can a spouse who has not applied for ancillary relief before a divorce decree is made absolute, make such an application at an indefinite time thereafter? If so, can she do it without obtaining the leave of the court? If leave is B required, under what circumstances should it be granted?

In a very lucid judgment, Abdul Aziz J held that such an application cannot be made without leave, and refused it.

In a nutshell, the situation here was that the respondent ('the husband') filed his divorce petition on 22 June 1987. The appellant ('the ex-wife') C who was duly served, and was legally represented at all material times, did *not* file an answer to the petition which contained prayers for orders by way of an ancillary relief to the effect that the wife pay him half the proceeds of two properties and half the market value of all shares and securities acquired by the wife during the marriage. When the decree nisi was D granted on 10 February 1988, the judge adjourned the husband's prayers for ancillary relief into chambers.

The notes of evidence in the court below shows that the husband did not pursue his application on ancillary relief after the decree nisi was granted. On 14 June 1988, the decree nisi was made absolute. E

The husband has purchased a house in Petaling Jaya in 1983. Both parties had lived in the house till 1985. Thereafter, the husband stayed on in the said house, and paid the mortgage. In 1989, the husband remarried and continued to live in the said house with his new wife, her mother and an orphaned cousin. Before the petition was filed, the husband had also bought a car. F

More than three years after the decree absolute, the ex-wife filed an application on 19 July 1991 for ancillary relief claiming a half share in the said house and in the car. This application was subsequently amended without objection. The application itself was vehemently opposed and the husband took the position that if leave was granted, he should be allowed G to revive his own application for ancillary relief which he did not pursue earlier. This aspect of the matter is now of academic interest.

Before us, the appellant's counsel asserted that since the ex-wife had not filed any answer at all, she did not require any leave from the court to apply for ancillary relief, and that the passage of any length of time after H the decree of dissolution was irrelevant. He supported this bold submission by referring to various English authorities.

With the greatest respect, we do not think they are of any assistance.

As is clear from *Chaterjee v Chaterjee* [1976] 1 All ER 719 at p 722, the power to grant ancillary relief in England was contained in ss 19 and I 20 of the Matrimonial Causes Act 1950. The words 'on any decree' in these sections were construed in England to mean 'within a reasonable time after the decree'. The dispute as to what this meant required

A Parliamentary intervention by the Matrimonial Causes (Property and Maintenance) Act 1958, which by s 1 provides that:

> (1) Any power of the court, under [ss 19 and 20 of the 1950 Act and other sections] shall ... be exercisable either on pronouncing such a decree or at any time thereafter.

B The fundamental rule governing applications in England by a petitioner or a respondent for ancillary relief were contained in r 68 of the Matrimonial Causes Rules 1973, which reads as follows:

> (1) Any application by a petitioner or by a respondent who files an answer claiming relief, for —
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> (a) ... ,
> (b) financial provision order,
> (c) a property adjustment order,
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> shall be made in the petition or answer, as the case may be.
>
> (2) Notwithstanding anything in paragraph (1), an application for ancillary
> D relief which should have been made in the petition or answer may be made subsequently —
> (a) by leave of the court ... .

This was replaced by the Matrimonial Causes Rules 1977 (r 68) which in turn was replaced by r 2.53 of the Family Proceedings Rules 1991, which
E reads:

> 2.53 Application by petitioner or respondent for ancillary relief
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> (1) Any application by a petitioner, or by a respondent who files an answer claiming relief for —
> (a) an order for maintenance pending suit,
> (b) a financial provision order,
> F (c) a property adjustment order,
>
> shall be made in the petition or answer, as the case may be.
>
> (2) Notwithstanding anything in paragraph (1), an application for ancillary relief which should have been made in the petition or answer may be made subsequently —
> G (a) by leave of the court, either by notice in Form M11 or at the trial; or
> (b) where the parties are agreed upon the terms of the proposed order, with leave by notice in Form M11.
>
> (3) An application by a petitioner or respondent for ancillary relief, not being an application which is required to be made in the petition
> H or answer, shall be made by notice in Form M11.

The commentaries in Rayden's *Law and Practice in Divorce and Family Matters* (14th Ed, 1983) Vol 1 at p 714 reads:

> The claim for any financial relief by a respondent spouse who files an answer claiming matrimonial relief (ie a prayer for decree) must be made in
> I the answer; ... If it is not so made, either because at the time of application no such answer has been filed, or because it is not intended to file such an answer, then application by notice in Form 11 may be filed; a party who allows the suit to go through undefended is free of constraint in this regard

> at all times; in such case the claim or claims may be made without leave at any time (provided that the claimant has not remarried — *Charterjee v Chaterjee* [1976] Farm 199 at p 208, [1976] 1 All ER 719 at p 724 (CA) per Ormrod LJ). If an answer claiming matrimonial relief is filed and the claim is omitted therefrom, the leave of the court is required to make the claim by notice in Form 11 or at the trial.

Similar statement can be found in Humphreys' *Family Proceedings* (18th Ed) at p 173 where the critical passage reads:

> An application for ancillary relief which is not required to be made in the petition or answer (such as when an answer is filed not seeking a decree or where no answer has been filed) must be made by notice in Form M11 (FPR, r 2.53(3)(3)) (see p 176 for requirements). Leave is not required ...

and also in 13 *Halsbury's Laws of England* (4th Ed), para 713; *A Practical Approach to Family Law* by Jill Black at pp 152–153 especially para 3.3.2; Bromley's *Family Law* (8th Ed) at pp 724–726; *Matrimonial Suits and Property Proceedings* (3rd Ed) by Martyn Berkin at p 165 (para 7) and finally, Rayden and Jackson's *Law and Practice in Divorce and Family Matters* (16th Ed) Vol 1 at pp 702–703.

We must record here our appreciation of Mr Sidhu for researching this question so thoroughly. It is a matter of regret to us that his industry cannot be more amply rewarded.

Reading the English cases on the point and the commentaries aforesaid, we are convinced that the Malaysian Act and the Rules thereunder were advisedly so worded so that the decree absolute should, as far as is humanly possible, leave each spouse free to make a new life for himself or herself without being unjustly harassed by fresh claims from a disgruntled ex-spouse which should properly have been ventilated at the time the decree was being made.

The relevant section in our Act is very differently worded from the English legislation. Section 76 of the Law Reform (Marriage and Divorce) Act 1976 reads as follows:

> (1) The court shall have power, *when* granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of such assets and the division between the parties of the proceeds of sale ... .
>
> (3) The court shall have power, *when* granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale ... . (Emphasis added.)

It is the opinion of this court that 'when' here means at the time the decree is being granted. We have in a previous decision touched upon the undesirability of deferring the issues of ancillary relief especially in consent decrees (see *Leow Kooi Wah v Ng Kok Seng Philip & Anor* [1995] 1 MLJ 852). Occasions may arise where the legal advisors or even the court may think it tactically advisable to grant the decree first because, inter alia, it

may simplify the resolution of the collateral issues. The residuary powers of the court to extend or to abridge time is always there, but the words are clear and any order for ancillary relief must relate back to the granting of the decree because it is upon the decree that the ancillary relief is hinged.

Rule 56 of the Divorce and Matrimonial Proceedings Rules 1980 makes the position clearer. It reads:

> 56 Application by petitioner or respondent for ancillary relief
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> (1) Any application by a petitioner, or by a respondent who files an answer claiming relief, for —
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> (a) an order for maintenance pending suit;
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> (b) a property division order, under section 76 of the Act; or
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> (c) a maintenance order, under section 77 of the Act,
>
> shall be made in the petition or answer, as the case may be.
>
> (2) Notwithstanding paragraph (1), an application for ancillary relief which should have been made in the petition or answer may be made subsequently —
>
> (a) by leave of the court, either by Notice in Form 11 or at the trial; or
>
> (b) where the parties are agreed upon the terms of the proposed order, without leave by notice in Form 11.
>
> (3) An application by a petitioner or respondent for ancillary relief, not being an application which is required to be made in the petition or answer shall be made by notice in Form 11.

In this case, we are concerned only with r 56(1)(b). The ex-wife's claim for property division had to be made in her answer. Our interpretation of r 56(2)(a) is that if the claim for ancillary relief is not made in the petition or answer, it can be made subsequently at the trial, in which case no notice in Form 11 is required, or it can be made by leave of the court by notice in Form 11. Since s 76 requires the matter to be dealt with when granting the decree, we think the Form 11 notice must be filed before the decree is made.

The words 'or at any time thereafter' which appears in the English Act is plainly missing in our statute. Since this case concerns an application for the division of assets acquired during marriage, it comes within the four walls of s 76(1) and (3) of the Act. By failing to make her application before the decree nisi or at least before it was made absolute, we think that the ex-wife was too late.

For the present purposes, therefore, it follows that our interpretation of the word 'subsequently' in r 56(2) means after the answer was or should have been filed but before the grant of the decree absolute.

The line taken by the judge in the court below was that the application could be made even after the decree provided leave was obtained. If this is the right approach, then we must say that leave was properly refused in this case. There are other situations where post-decree absolute applications are permitted with leave under r 56(2)(b) or (3) which do not concern us here. It follows from what we have said that the husband's application for ancillary relief which was made in the petition must be deemed to have

lapsed since no order was made thereon before the decree was made absolute. A

For these reasons, stated we dismiss this appeal with costs. Deposit to be paid to the respondent towards his taxed costs. Order accordingly.

Appeal dismissed. B

Reported by Jafisah Jaafar

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